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NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

IVAN STEPHENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS WITH RESPECT TO WHETHER FED.R.CRIM.PRO. RULE 24 REQUIRES THE TRIAL COURT, UPON REQUEST, TO VOIR DIRE PROSPECTIVE JURORS WITH RESPECT TO THE WEIGHT THAT THEY WOULD GIVE TO THE TESTIMONY OF POLICE OFFICERS.

II.

WHETHER THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER POLICE AGENTS, WHO REMAIN INSIDE A HOME AND SEARCH THE HOME WHILE SECURING THE PREMISES, AND WHILE THE AGENTS SOUGHT AND OBTAINED A SEARCH WARRANT, EXCEEDED THE SCOPE OF THE WARRANT BY USING AND ANSWERING THE DEFENDANT'S TELEPHONES AND BY ATTEMPTING TO QUESTION THE CALLERS AND CALLEES WITH RESPECT TO THEIR PARTICIPATION IN A DRUG DEAL.

III.

WHETHER THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER ERROR IS HARMLESS BEYOND A

REASONABLE DOUBT, WHEN THE ABOVE-DESCRIBED CONSTITUTIONALLY INFIRM EVIDENCE WAS INTRODUCED INTO EVIDENCE, WHEN THE ABOVE-DESCRIBED EVIDENCE CONSTITUTED EXTRA-JUDICIAL HEARSAY AND VIOLATED THE CONFRONTATION CLAUSE BY HEAVILY IMPLICATING THE PETITIONER IN EXTRANEOUS CRIMINAL ACTIVITY, AND WHEN THE INDEPENDENT EVIDENCE WAS COMPOSED SUBSTANTIALLY OF DEA AGENTS' TESTIMONY.

PARTIES IN THE ELEVENTH CIRCUIT

United States of America
Frank Vadino
Ivan Stephens
Elio Perez-Herrera
Eduardo Comensana
Ralph Natale

ADDITIONAL PARTIES IN COURTS BELOW

Antonio D'Amato

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REFERENCE TO OFFICIAL REPORTS

The opinion of the lower courts is reported in United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982), rehearing denied, 691 F.2d 977 (11th Cir. 1982).

JURISDICTION

On July 19, 1982, the Eleventh Circuit Court of Appeals affirmed the

Petitioner's conviction. See, United States v. Vadino, supra, 680 F.2d 1329 (11th Cir. 1982). On November 15, 1982, the Eleventh Circuit denied rehearing. 691 F.2d at 978 (11th Cir. 1982). The Supreme Court has jurisdiction pursuant to 28 U.S.C. 1254(1). Petitioner seeks review of a final decision of the Court of Appeals affirming Petitioner's judgment, conviction and sentence.

RELEVANT CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

U.S. Const., Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. 841:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
Pub.L. 91-513, Title II, 406, Oct. 27, 1970, 84 Stat. 1265.

Fed.R.Crim.Pro. Rule 24(a):

(a) Examination. The court may permit the defendant or his attorney and the attorney for the govern-

ment to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Fed.R.Ev. Rule 801:

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if --

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceedings, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the

existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. (As amended Pub.L. 94-113, 1, Oct. 16, 1975, 89 Stat. 576.)

Fed.R.Ev. Rule 802:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

28 U.S.C. 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be

restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below.

The Petitioner, Ivan Stephens, was the defendant in the trial court, and the Respondent, the United States of America, was the prosecution. In this brief, the symbol "R" will be used to designate the various transcripts of proceedings before the trial court. "TR" will be used to designate the transcript of the trial itself. "SR" will designate supplemental records. All emphasis is added unless otherwise indicated.

Petitioner Stephens was charged in three counts of a nine count indictment with eight co-defendants. In Count I of the indictment, he was accused of conspiracy to knowingly possess, with the intent to distri-

bute, cocaine and methaqualone, in violation of 21 U.S.C 841(a)(1), and 21 U.S.C. 846. In Count II of the indictment, Petitioner was charged with possession, with the intent to distribute, methaqualone and cocaine in violation of 18 U.S.C. 841(a)(1). In Count III, Petitioner was charged with possession with the intent to distribute, cocaine in violation of 21 U.S.C. 841(a)(1). (R: 1-7; 66-72).

Trial commenced on July 3, 1980, and was terminated on July 14, 1980, with a verdict of guilty returned against Petitioner on all three counts (R: 371).

Petitioner filed a Motion for New Trial on July 21, 1980 (R: 415-416). This motion was denied on August 5, 1980 (R: 457).

On September 2, 1980, the Petitioner was sentenced to a term of imprisonment of five years on each of the three counts, with the second count to run consecutive to the first count, and the third count to run concurrently with the second count. In addition, a parole term of three years and a fine of $2000 were imposed on Petitioner (R: 519).

On September 8, 1980, Petitioner filed a Notice of Appeal (R: 469). On July 19, 1982, the panel affirmed with opinion. On November 14, 1982, the panel denied Petitioner's petition for rehearing and Petitioner's petition for en banc consideration. See United States v. Vadino, 680 F.2d 1324 (11th Cir. 1982), rehearing denied F.2d (11th Cir. 1982).

In late January and early February, 1979, Government agents posed as undercover purchasers of cocaine and methaqualone (TR: 286-289). On January 31, 1979, they received samples of cocaine and methaqualone from Petitioner and his co-defendants in the Bahia Mar Hotel (TR: 295-305, 400).

On February 8, 1979, at 11:30 A.M., agents of the Drug Enforcement Administration arrested Petitioner, and co-defendants Natale, Vadino, Comensana and D'Amato, at a house on Jack Rabbit Lane, in Hialeah, Florida. (TR: 351). Seized at this residence were two kilos of cocaine and paraphernalia that were introduced into evidence against Petitioner. (TR: 370).

Twenty minutes after the arrest, prior to obtaining a search warrant, (TR: 373), the agents intercepted a phone call from Wendy Stephens to Petitioner. (TR: 399). When she asked to speak to her husband, Ivan Stephens, the agents asked her to "bring the stuff over" (TR: 399, 631-634). The affidavit states that she said that Reuben was present. (R: 262-278).

The agents proceeded to the house that Mrs. Stephens shared with Petitioner at Milk Wagon Lane (SR: 45). They went there because they suspected that drugs were on the premises and they wanted to secure them. (SR: 46). This house was asserted to be a five-minute walk from the house at Jack Rabbit Lane. (R: 262-278).

The agents did not have a search warrant at this time. A search warrant was obtained to search the Milk Lane house at 4:00 p.m., several hours after the agents first entered the premises.[1/]

The agents remained at Milk Wagon Lane until 10:00 p.m. (TR: 986, 988, 1005). In that time, they received and recorded several calls from Elio Perez-Herrera (TR: 986, 988, 1005). They also initiated and recorded outgoing calls to Perez-Herrera (TR: 950, 953, 986, 988, 1005). Several of these calls were recorded (TR: 950, 953, 978), and the substance of the unrecorded call was introduced into evidence.

1/ The warrant was not obtained several minutes later, as suggested by the panel opinion. Sl.op. at 2026.

The warrant authorizing entry into the Milk Wagon Lane address did not authorize the interception of phone calls, or the use of the phones to make outgoing calls (R: 262-278). (App. 40). Although there was extensive wiretapping of co-defendants Vadino and Natale (TR: 477, 485-488, 524), no conversations of Petitioner were recorded during the entire investigation.

The Perez-Herrera tapes themselves also heavily inculpated the Petitioner. The Government concedes that there was insufficient evidence independent of the tapes themselves to satisfy the requirements of the co-conspirator's exception to the hearsay rule. See, Fed.Rule Ev. Rule 801(D)(2)(E).

The trial judge admitted the recordings of Perez-Herrera because the agents, as parties to the conversations, consented to their recording (TR: 871-872). It is from these rulings that Petitioner filed his appeal.

The Government conceded that the Perez-Herrera and Wendy Stephens conversations were inadmissible hearsay. However, the Eleventh Circuit held that Stephens was "nailed" by "overwhelming independent evidence." Thus, the panel held that error was harmless beyond a reasonable doubt.

During the trial, the court refused to allow voir dire of the prospective jurors as to whether they could follow an instruction not to give greater weight to the testimony of law enforcement officers. (TR:

86-88). The panel concluded, that the trial court did not abuse its discretion, and cited binding rulings of the former Fifth Circuit.

ARGUMENT

I

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI, TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER THE TRIAL COURT ABUSES ITS DISCRETION DURING *VOIR DIRE*, WHEN THE COURT REFUSES TO QUESTION THE PROSPECTIVE JURORS AS TO WHETHER THEY WOULD TEND TO BELIEVE OR ACCEPT A LAW ENFORCEMENT OFFICER'S TESTIMONY OVER THAT OF AN ORDINARY PERSON, MERELY BECAUSE THE WITNESS IS A LAW ENFORCEMENT OFFICER.

During *voir dire*, the trial court refused the Petitioner's request to question the prospective jurors concerning the weight that the jurors would give to the testimony of

a law enforcement officer, as opposed to an ordinary citizen's testimony. (TR: 86-88).

The Petitioner proffered two specific questions:

> "(W)hether or not the jury would follow instructions that the testimony of the law enforcement officer is to be given no greater loss or weight than any other witness" (TR: 86).
>
> "Whether ... (the prospective jurors) ... would lend any more credence to a Government witness, be it agent, or allegedly clothed by the United States cloak, so to speak, whether or not they would because of that fact alone, they would lend more credence to testimony. (TR: 88).

The court denied both requests (TR: 87, 89).

The court instructed the jury, after the panel had taken the oath of office that:

> In "considering the weight and value of the testimony of any witness, you may

> take into consideration" ... the ... "relation of the witness to the Government" (TR: 1111-1112).

In the court's final charge, the court instructed the jury that:

> "In weighing the testimony of a witness, you should consider his relationship to the Government or the defendant ..." (TR: 1428).

The Appellate court recognized that Stephens potentially suffered prejudice from the court's refusal to voir dire the jury with respect to the weight that the jurors would give to the testimony of law enforcement agents. United States v. Vadino, 680 F.2d 1329, 1336 (11th Cir. 1982).

A substantial amount of the evidence against Stephens came from law enforcement agents. Although conversations involving Natale and Vadino were intercepted and recorded, there

were no recordings involving Ivan Stephens.

The District Court possesses broad discretion in the conduct of the voir dire examination. Aldridge v. United States, 283 U.S. 308, 310 (1931); Spells v. United States, 263 F.2d 609, 612 (5th Cir. 1958). The District Court's discretion is limited only by the "essential demands of fairness." Aldridge v. United States, 283 U.S. at 310.

Rule 24 of the Federal Rules of Criminal Procedure effectuates the Sixth Amendment guarantee to a fair and impartial jury. The question, of whether Rule 24(a) recuires voir dire examination with respect to the weight and credibility of law enforcement officers, has divided the Federal Circuit Courts of Appeal.

The First, Fourth, Fifth, Eighth, and Eleventh Circuits share the view that the trial judge's refusal to permit voir dire examination with respect to the weight and credibility given to a law enforcement officer's testimony does not constitute an abuse of discretion. See, Gorin v. United States, 313 F.2d 641 (1st Cir. 1963); United States v. Gore, 435 F.2d 1110 (4th Cir. 1970); United States v. Gassaway, 456 F.2d 624, 626 (5th Cir. 1972); United States v. Vadino, supra; Ross v. United States, 347 F.2d 97 (8th Cir. 1967).

The District of Columbia, Seventh, Ninth, and Tenth Circuits have held that where a police officer's testimony comprises virtually all of the Government's case, the

District Court abuses its discretion when it refuses to conduct such an examination. See, Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959); Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); United States v. Martin, 507 F.2d 428 (7th Cir. 1974); United States v. Baldwin, 607 F.2d 1295 (9th Cir. 1979); Chavez v. United States, 258 F.2d 816, 819 (10th Cir. 1958) (dictum); United States v. Brewer, 427 F.2d 409, 410 (10th Cir. 1970).

The Circuits have divided 5-4 on this question. It seems unlikely that this schism will be narrowed by anything other than a definitive ruling by the Supreme Court. See, Supreme Court Rules, Rule 17.1(A). Moreover, such a voir dire as requested herein, is necessary to

ensure the "essential demands of fairness."

> "The sole purpose of voir dire is not to tell potential jurors tht they are to be fair and then ask them if they think they can be impartial. The defendant's proposed questions were meant to elicit specific attitudes and prejudices. We cannot assume that a juror would state that he could not be impartial merely because he had a close relationship with the government or a high regard for the credibility of government agents. Such questions should have been asked directly." United States v. Martin, supra, 507 F.2d at 432-433.

> "...(W)hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more or less inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested." Brown v. United States, supra, 338 F.2d at 545.

This Court should grant certiorari to resolve the conflict between the Circuits.

II

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER AGENTS VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHTS WHEN THE AGENTS ANSWERED PETITIONER'S PHONES AND USED HIS PHONES TO MAKE OUTGOING TELEPHONE CALLS, DURING A LAWFUL SEARCH PURSUANT TO A SEARCH WARRANT, WHEN THE SEARCH WARRANT DID NOT DIRECTLY OR IMPLIEDLY AUTHORIZE THE USE OF PETITIONER'S PHONES.

Resolution of this issue would provide substantial guidance to the Circuits. As in all Fourth Amendment cases, a substantial tension exists between the right of government agents to conduct investigations into criminal activity, and the right to privacy possessed by persons who are

subjected to governmental intrusions as a result of those investigations.

On several occasions, this Court has emphasized that there are limitations to the scope of search warrants. See, Walter v. United States, 100 S.Ct. 2395, 2401, n.6 (1980), Marron v. United States, 275 U.S. 192 (1927). The Supreme Court has previously upheld the expectation of privacy of arrested persons against warrantless searches of the person's lawfully seized effects. See, Arkansas v. Sanders, 99 S.Ct. 2586 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

The present case offers an opportunity to re-affirm the expectation of privacy possessed by an arrested person that police agents, who lawfully enter the arrested person's

residence, will not exceed the scope of the search warrant that authorizes their entry.

This question will present substantial guidance to the Circuits. Factual settings have arisen in several other cases, in which police agents have remained on an individual's premises and used and answered that person's telephones. See generally, United States v. Killian, 524 F.2d 1268 (5th Cir. 1975) (Fourth Amendment question did not arise, but similar fact setting); United States v. Kane, 450 F.2d 77 (5th Cir. 1971); United States v. Campagnuolo, 592 F.2d 852, 863, n.14 (5th Cir. 1979); United States v. Figueroa, et. al., 11th Cir. No. 82-5699 (No opinion, appeal pending, Fourth Amendment question did not

arise, but similar factual setting). Thus, this question is becoming increasingly significant in the Circuits. Moreover, this question presents an opportunity to define the parameters of permissible intrusions pursuant to search warrants. Thus, this case has substantial importance beyond the factual setting of the present case.

Petitioner was an aggrieved person within the meaning of the Fourth Amendment. The conversations occurred on premises over which he exercised dominion and control. (TR: 1084-1085, 951). Thus, the Petitioner possessed an expectation of privacy over all conversations occurring on those premises. See, Alderman v. United States, 394 U.S. 166, 179, n.11 (1969).

The agent's use of Petitioner's telephones, to accept incoming telephone calls, and to make outgoing telephone calls, exceeded the scope of the search warrant. Thus, the search offended Fourth Amendment standards.[2/]

On February 8, 1979, at 12 p.m., Petitioner was arrested at Jack Rabbit Lane (TR: 338-339). The

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2/ The United States Court of Appeals for the Eleventh Circuit did not address this question. The Court has twice been faced with this issue. In United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979), the court addressed 18 U.S.C. 2510 et seq., Title III, Omnibus Crime and Safe Streets Act. In the present case, the court held the error to be harmless. United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982), rehearing denied, 691 F.2d 977 (11th Cir. 1982). The question of harmless error is addressed in Section III, relating to a violation of the Confrontation Clause.

agents received a call from Wendy Stephens. (TR: 399). The agents proceeded to Milk Wagon Lane.

At Milk Wagon Lane, the agents arrested Wendy Stephens. They waited at the house to secure the premises, and to obtain a search warrant. At 4:00 p.m., the magistrate signed the search warrant. (TR: 1030-1034). The agents remained in the house until 10 p.m. (TR: 951). In the ten hours that the agents remained on the premises, they made and received six incoming and outgoing telephone calls. (TR: 936, 950, 953, 979, 986, 988). Several of these calls were recorded. (TR: 878, 950, 953). The substance of the unrecorded call was introduced into evidence. Each of the challenged conversations involved DEA agents and Elio Perez-Herrera.

Petitioner's counsel objected to the introduction of the recordings. (TR: 840-841). The trial judge admitted the recordings, because the agents, as parties to the conversations, consented to the recording of the calls. (TR: 871-872).

The Eleventh Circuit did not address the Fourth Amendment issue, and held that any error was harmless error[3/]. See, United States v. Vadino, supra, 680 F.2d at 1334-1335 (11th Cir. 1982). The court held that Petitioner's objection to

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3/ The Perez-Herrera tapes constituted the fruits of the alleged Fourth Amendment violation. The same tapes constituted extra-judicial hearsay. See, Issue III, infra. The discussion in Issue III of whether those tapes constitued harmless error applies equally to this issue. See, Chambers v. Maroney, 399 U.S. 42 (1970).

the first incoming call from Perez-Herrera was waived at the time of trial. United States v. Vadino, supra, 680 F.2d at 1335. Appellant objected to the remaining calls.

Two outgoing calls were made from the Miami DEA office. (TR: 1005, 1015). These calls were the fruits of the earlier conversations. The agents developed a degree of trust with Perez-Herrera, based upon the use of Stephens' telephones (TR: 951). Petitioner also objected to the introduction of these calls.

The warrant clause of the Fourth Amendment provides that:

> "No warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (emphasis added). U.S. Const. Amend. IV.

"At the core of the Fourth Amendment ... is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed." Payton v. New York, 100 S.Ct. 1371, 1378 (1980); Zurcher v. Stanford Daily News, 436 U.S. 547 (1978); Stanford v. Texas, 379 U.S. 476 (1965). The purpose of the particularity requirement is to protect the person whose premises are subject to the warrant from the rummaging of searchers into all of his effects. Zurcher, supra; Walter v. United States, 100 S.Ct. 2395, 2401, n.6 (1980).

The fact that agents are lawfully on the premises, or obtain lawful possession of effects, does not authorize them to exceed the scope of that

authorization. Coolidge v. New Hampshire, 403 U.S. 481, n.26 (1971). Despite the lawful presence of the agents, the owner maintains a reasonable expectation of privacy. Michigan v. Tyler, 436 U.S. 499 (1978); Ybarra v. Illinois, 100 S.Ct. 338 (1979). Further intrusions require judicial authorization of those intrusions. United States v. Chadwick, infra; Arkansas v. Sanders, 99 S.Ct. 2586 (1979).

The Fifth Circuit has held that agents lawfully on the premises of a bookmaking operation may answer the telephones. United States v. Kane, 450 F.2d 77 (5th Cir. 1971). There is a sufficient nexus between a bookmaking operation and the telephones because the telephones are the very means by which a bookmaking operation

is carried out. Id. at 85; United States v. Mendoza, 473 F.2d 692, 697, n.2 (5th Cir. 1971); United States v. Various Gambling Machines, 478 F.2d 1194 (5th Cir. 1972). It would strain reason to suggest that the telephone is an inherent instrumentality of a narcotics offense.

"When an official search is properly authorized - whether by consent or by the issuance of a valid warrant - the scope of the warrant is limited by the terms of its authorization." Walter v. United States, 100 S.Ct. at 2401. An item cannot be seized under a warrant describing another item. Marron v. United States, 275 U.S. 192 (1927).

Just as watches cannot be seized under a warrant authorizing the seizure of binoculars, United States

v. Dzialak, 441 F.2d 212 (2d Cir. 1971), and letters may not be seized under a warrant authorizing the seizure of narcotics, United States v. Hill, 263 F.2d 812 (D. Ohio, 1920), telephone calls are not subject to seizure under a warrant authorizing the seizure of narcotics and its instrumentalities.

Because the use of Petitioner's phone was not within the permissible scope of the warrant, the interception of the calls would be permissible under the Fourth Amendment only if the interception fell within an exception to the warrant requirement. United States v. Kane, supra.

One of the exceptions to the warrant requirement is that a party to the conversation acting under "the

color of law" may consent to the interception. 18 U.S.C. s. 2511(d)(2); United States v. Mendoza, 574 F.2d 1373, 1377 (5th Cir. 1978). Where a consensually recorded conversation is not seized "under the color of law," the conversations and its fruits must be excluded from evidence. United States v. Turk, 526 F.2d 654, 666 (5th Cir. 1976).

In United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979), the Fifth Circuit upheld the right of agents to remain on premises and consent to recording conversations in a bookmaking operation. Id. at 861-863. The court interpreted Title III, but expressly withheld ruling on whether the search satisfied Fourth Amendment standards. Id. at 863, n.14.

In the present case, the agents did not possess sufficient common authority to consent to the use of Petitioner's telephone and to consent to the recording of the conversations.

The Supreme Court has emphasized that:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent ... rests rather on mutual use of the property by persons generally having joint access or control for most purposes (emphasis added), so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched (emphasis added)." United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

The basis of a consensual interception is that a party to the conversation assumes the risk that his coparty will consent to the recording of his conversations. Ansley v. Stynchombe, 480 F.2d 437, 441 (5th Cir. 1973); citing, United States v. White, 401 U.S. 745, 752 (1971).

An arrested person does not assume the risk that his property will be seized and searched absent judicial authorization. United States v. Chadwick, 433 U.S. 1 (1977), (supra, and its progeny). He only risks seizure of property within an area close to his arrest, under the incident to a lawful arrest exception to the warrant requirement.

A Government agent, who enters premises pursuant to a search warrant, does not possess sufficient

common authority to satisfy the third-party consent test. By definition, the agent is an intruder. "The function of the warrant is to provide the property owner with ... reassur(ance) of the entry's legality." Michigan v. Tyler, supra; United States v. Chadwick, supra at 9. Thus, the warrant confers only the right to lawful presence for the purpose of conducting the described search.

Lawful presence has never been interpreted to satisfy the joint control test. See, Stoner v. California, 376 U.S. 483 (1964); Chapman v. United States, 365 U.S. 610 (1961); United States v. Harris, 534 F.2d 95, 97 (7th Cir. 1976). Joint control requires that there be a mutual occupancy, such that the owner assumes the risk that his joint

occupant would "allow someone else to look inside." United States v. Matlock, supra at 171, citing Frazier v. Cupp, 394 U.S. 731, 740 (1969).

Because the agents were not possessed with joint access or control, the use of Petitioner's phones, and the interception of Perez-Herrera's conversations, were unreasonable. Thus, this search did not fall within a recognized exception to the warrant requirement. This Court should grant certiorari to resolve this important question.

III

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER SUBSTANTIALLY INCULPATORY TAPE RECORDINGS CONSTITUTE VIOLATIONS OF THE CONFRONTATION CLAUSE, AND CONSTITUTE HARMLESS ERROR, WHEN SUCH TAPES ARE NOT CO-CONSPIRATOR'S DECLARATIONS,

AND LIVE WITNESS TESTIMONY CONSTITUTES THE SUBSTANTIAL EVIDENCE AGAINST THE DEFENDANT.

This case presents a unique opportunity to analyze the relationship between the Confrontation Clause and the hearsay rule. In Dutton v. Evans, 400 U.S. 74 (1970), a plurality of this Court emphasized that the hearsay rule, and the Confrontation Clause, are not co-extensive. In the case at bar, the Government conceded that the hearsay rule was violated, See, United States v. Vadino, supra, 680 F.2d at 1333-1334, but claimed that the Confrontation Clause was not violated. In rejecting the Petitioner's application for rehearing, the Court applied the Constitutional Standard for harmless error. United States v. Vadino, supra, 691 F.2d at 978.

This case also presents the Court with the opportunity to determine standards for the Circuits to employ in applying the harmless error doctrine. To the extent that the Confrontation Clause was violated, the Standard of "harmless error beyond a reasonable doubt" applies. See, Chapman v. California, 386 U.S. 18 (1967). The instant factual setting offers the Court the opportunity to delineate standards for the application of the "harmless error beyond a reasonable doubt" test.

The objectionable declaratory evidence was the Perez-Herrera tapes. See, Issue II, infra.[4/] The

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4/ The same standard for harmless error applies in each case. See, Harrington v. California, 395 U.S. 250 (1969); Chambers v. Maroney, 399 U.S. 42 (1970); Chapman v. California, supra.

agents proposed a future drug transaction with Perez-Herrera. During this time, the agents questioned Perez-Herrera with respect to the narcotics seized in the present case.

The content of the conversations, heavily inculpated Stephens. During the first conversation, Perez-Herrera "told ... Bumar ... that he was Ivan's source of supply for drugs, and told me to have Ivan calling him up." (TR: 952). Bumar proposed that Perez-Herrera and Bumar enter into a future drug transaction. Bumar told Perez-Herrera that he would contact Ivan Stephens. (TR: 953).

Bumar returned Perez-Herrera's call. Bumar told Perez-Herrera that he would drive to Fort Lauderdale to speak with Stephens (TR: 960). He told Perez-Herrera:

"Ivan showed me some of the ludes in the house, okay? Like I said, he had a bunch, okay? Fine. Now these people, you know, I'm sure if I told them, hey we got a bunch, they can take it back to New York, no problem. The thing is, though, the stuff he showed me, some of it looked bad, you know? What's the story? He said you got that. How good is the stuff?"

Perez-Herrera:

"Well look, I got three kind man" (TR: 961).

The agent and Perez-Herrera discussed a prior sale of pills to Stephens (TR: 961). They discussed Perez-Herrera's delivery of cocaine to Stephens (TR: 963-965). They discussed Stephens' alleged attempt to procure pills from Perez-Herrera that very day (TR: 967).

S/A Bumar:

"Didn't he tell you he needed 10 keys?"

Perez-Herrera:

> "No, he told me he needed half a million ... pills ... I told him I didn't have half a million. I only had a half a ... 100,000. I had a million and a half, but ... ran out of them." (TR: 967-968).

Perez-Herrera told Bumar to have Stephens call him (TR: 968-969; 971). Perez-Herrera also told Bumar that Stephens would vouch for his credibility (TR: 969). Perez-Herrera told the agent that he did "a million business" with Stephens (TR: 971). Perez-Herrera told Bumar that, if Stephens approved, he would bury Bumar in pills (TR: 974).

During the next conversation, Bumar called Perez-Herrera and relied on a purported conversation between Stephens and Bumar, in which Stephens approved the sale of the drugs (TR: 980). Perez-Herrera told Bumar that

he preferred to deliver the drugs to Stephens, "because he is my client" (TR: 981).

Perez-Herrera told Bumar to "get Ivan in touch with me or forget about it" (TR: 985). "Ivan gets in touch with me. His wife tells me yes, okay. I make the deal." (TR: 985, 999). Every tape was inadmissible under the hearsay rule. United States v. Vadino, supra, 680 F.2d at 1334. United States v. Killian, 524 F.2d 1268.

The case against Stephens consisted substantially of the testimony of the Government agents. At one point, the trial judge commented, at side-bar, on an agent's demeanor on cross-examination. The agent was trying to be "clever" (TR: 1149).

The Court of Appeals detailed the

independent evidence:

> "Stephens had been at one of the initial meetings aboard a yacht, where he delivered to agents samples of cocaine and Quaaludes. He described the Quaaludes as coming from Colombia and stated that they had an "excellent supply." At a later meeting on the boat Stephens quoted the price of cocaine and Quaaludes, stated the location for delivery, gave instructions for getting there, said that delivery would in in increments, and stressed the need for caution. When the group met at the Jack Rabbit Lane house for the delivery, Comesana left at Stephens' direction and returned later with a box containing a kilo of cocaine, which Stephens weighed and tested. Later that day Stephens' home was searched, and drugs and drug paraphernalia found there. Stephens offered no evidence in his defense."

In addition, interception of co-defendants Natale and Vadino, with the agents, referred to Stephens'

involvement. (TR: 493, 503). The agents did not intercept any conversations involving Stephens.

The conversations implicated Stephens' rights under the Confrontation Clause. U.S. Const. Amendment VI.

Statements that fall within the co-conspirator's exception possess persuasive assurances of reliability. Thus, the statements do not implicate a defendant's Confrontation rights. See, Dutton v. Evans, 400 U.S. 74 (1970). However, some statements that fall outside of the co-conspirator's exception implicate a defendant's rights under the Sixth Amendment Confrontation Clause. See, Id.; See also, United States v. Castillo, 615 F.2d 878, 883 (9th Cir. 1980). The Ninth Cir-

cuit adopts the four-part Dutton test:

> "(T)he Dutton test looks to the following indicia of reliability: (1) whether the declaration contains an assertion of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) the possibility that the declarant is relying upon faulty recollection; (4) whether, under the circumstances, there is reason to believe the declarant misrepresented the defendant's involvement." Id.

The Tenth Circuit broadens the Dutton test. See, United States v. Roberts, 583 F.2d 1173 (10th Cir. 1978). In Roberts, the court recognized that evidence falling into an exception to the hearsay rule may still not comply with the Confrontation Clause. Id. at 1178. The court's test analyzes:

> (1) what opportunity the jury had to evaluate the credibility of the decla-

> rant, (2) whether the statements were crucial to the government's case or devastating to the defense, (3) the declarant's knowledge of the identities and roles of the other co-conspirators, (4) whether the extrajudicial statements might be founded on faulty recollection, (5) whether the circumstances under which the statements were made provide reason to believe the declarant misrepresented defendant's involvement in the crime, (6) whether the statements were ambiguous, (7) what limiting jury instructions, if any, were given, (8) whether prosecutorial misconduct was present, etc. Id.

The Dutton test, and the Tenth Circuit's test, were not satisfied in the present case. Perez-Herrera's statements against interest carried no assurances of reliability with respect to Stephens. Perez-Herrera's interest was in perfecting his own lucrative drug deal with the agents. Perez-Herrera had every interest in

representing a close involvement with Stephens, because the agents were relying on the cloak of Stephans' reliability.

Perez-Herrera had little to lose by lying. If Perez-Herrera was lying about his past involvement with Stephens, and the claim was not uncovered, Perez-Herrera would have successfully perfected a "deal" with the agents. If Perez-Herrera had claimed that he was not involved with Stephens, he faced the certain loss of prospective business, because the agents were relying on the cloak of Stephens' reliability. Although Perez-Herrera risked losing business if his story was untrue, and the untruth was discovered, the risk was much greater that Perez-Herrera would

lose the business if he said that he was not involved with Stephens.[5/]

In this context, violations of the Confrontation Clause are not harmless error.

Perhaps the best evidence of the impact of evidence is the reliance that the prosecutor places on the evidence in closing argument. In the

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5/ Perez-Herrera's actions must examined in the context of a clandestine drug deal. Perez-Herrera's protection, against retaliation for lying, was his telephone anonymity. However, he had to act as a narcotics dealer, in the same or in a similar situation, would act. Otherwise, he risked physical harm or the loss of his business when he personally contacted his buyers. There is no doubt that Perez-Herrera and Stephens knew each other. Perez-Herrera's first call was an incoming call to Stephens' house. Moreover, a search of Stephens' trash masher revealed a slip of paper with the name "Elio" on it. Although Perez-Herrera wanted the agents to have Stephens call him,

(fn.cont.)

present case, the prosecutor told the jury to rely on the tapes, and that the prior and proposed future course of dealing between Stephens and Perez-Herrera evidenced their participation in the conspiracy.

> "(Perez-Herrara) says in numerous places on the tape, as I recall, that he left pills there before, and came to pick up his money; that he has all the cocaine they could want; that he has done a million

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(fn.cont.)
Perez-Herrera would accomplish his purposes by the fact of the call, without discussing narcotics. Because Stephens and Perez-Herrera knew each other, the risk of discovery of an untrue relationship was minimized. Because Stephens never called Perez-Herrera, whether they would have discussed a drug deal is speculative. However, Perez-Herrera would have accomplished his objective of appearing to be careful by asking Stephens if he knew the prospective buyers, and if they were "good people", without discussing drugs at all. Thus, the reliability of Perez-Herrera's statements was minimal.

business with Ivan before; that he has left pills there; engaged in drug deals with the defendant Stephens on numerous occasions." (TR: 1324).

"I am going to ask you to rely on those tapes (emphasis added). I would ask you please, to listen very carefully to the conversations, because there are numerous references, which I believe during these conversations, which I suggest to you, I should say, which I suggest to you from those conversaitons indicate that the two kilos of cocaine were given to Edwardo Comensana, delivered to Stephens through the various links of conversations between Natale and Vadino, and which Anthony Damato knew the price, and was there during delivery; that they came from the defendant Elio Perez. Perez says on the telephone, he says, yes, words to the effect he had 500,000. Ivan wanted 500,000. He only had 100,000, gave them to somebody else. More important, I ask you to please listen carefully as to the testimony regarding the fact that he had 10 keys of coke, but now two of those are gone. He has only eight left." (TR: 1325).

> "I would suggest to you, in conclusion, to please listen to the tapes, involving Mr. Natale, Mr. Vadino and Mr. Perez; and I suggest to you that the evidence in its totality proves their guilt with respect to each count of the indictment well beyond a reasonable doubt."

The erroneous admission of hearsay cannot be harmless error, if the hearsay relates to extrinsic criminal activity, and the prosecutor uses the hearsay to infer participation in the current criminal activity. See, United States v. Webster, 649 F.2d 346 (5th Cir. 1980). In the present case, the prosecutor asked the jury to rely on Perez-Herrera's taped admissions of his alleged prior dealings with Stephens, and his proposed future dealings with Stephens and the agents, to infer that Perez and Stephens were involved in the

charged conspiracy. Thus, the court's finding of non-reversible error directly conflicts with Webster. See, also, United States v. Truslow, 530 F.2d 257, 264 (4th Cir. 1976).

In light of the fact that the prosecutor asked the jury to rely on the tapes, the tapes contributed substantially to Stephens' conviction.[6/]

"(B)efore a Federal Constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18 (1967).[7/]

6/ Thus, even under the standard for non-constitutional error, the jury must have been "substantially swayed" by the evidence. See, Kotteakos v. United States, 328 U.S. 750, 765 (1946).

7/ This standard applies in (fn.cont.)

In Harrington v. California, supra, the Court held harmless the admission of a co-defendant's inculpatory confession. The confession was merely cumulative. The Supreme Court noted, and the lower court emphasized, that Harrington had implicated himself. Id. See also, People v. Bosby, 256 Cal.App.2d 209, 217 (1967). (Lower court opinion in Harrington). When the defendant incriminates himself, substantially similar statements of co-defendants are merely cumulative. See,

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(fn.cont.)
cases where extrajudicial declarations, not subject to cross-examination, are erroneously entered into evidence. See, Harrington v. California, 395 U.S. 250 (1969). This standard also applies in Fourth Amendment contexts. See, Chambers v. Maroney, supra.

Schneble v. Florida, 405 U.S. 427, 430-431 (1972); see also, Brown v. United States, 411 U.S. 223, 225 (1973).

Although there was sufficient independent evidence of Stephens' involvement in the conspiracy to survive a Motion For Judgment of Acquittal, the declarations were not harmless beyond a reasonable doubt. See, United States v. Webster, 649 F.2d 346 (5th Cir. 1981). The inculpatory content of the tapes, the ready use of appellant's name by the declarant in connection with a proposed future transaction of narcotics, the absence of any assurances of reliability, the prosecutor's emphasis on the content of the tapes, and the credibility issue presented

by the absence of any independent tape recording of Stephens, created a context in which the admission of the tapes did not satisfy the harmless error test.

This Court should grant certiorari to consider the interrelationship between the harmless error doctrine, the hearsay rule, and the Confrontation Clause.

Respectfully submitted,

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VINCENT FLYNN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing were mailed this day of January, 1983, to the Office of the Solicitor General, 10th & Constitution Avenue, N.W., Washington, D.C., 20530, and to Joel M. Gershowitz, Assistant Attorney General, Office of the United States Attorney General, Dept. of Justice, Washington, D.C., 20530, and one copy was mailed to all counsel listed below:

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Opinion in Court Below.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Frank J. VADINO, Elio Perez-Herrera, Ivan L. Stephans, Eduardo Comesana, Ralph Natale, Defendants-Appellants.

No. 80-5716.

United States Court of Appeals, Eleventh Circuit.

July 19, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before GODBOLD, Circuit Judge, RONEY and WOOD*, Circuit Judges.

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

GODBOLD, Chief Judge:

Appellants were convicted of narcotics offenses, all appellants of conspiracy to possess, 21 U.S.C. 846, and some of possession with intent to distribute, 21 U.S.C. 841(a)(1). Also, one appellant was convicted of using a telephone to facilitate a narcotics offense, 21 U.S.C. 843, and another of carrying a firearm in commission of a felony, 18 U.S.C. 924(c)(2).

Government informant Allen introduced Drug Enforcement Adminstration agents to appellants Vadino and Natale. Thereafter agents participated in a series of negotiations with Vadino, Natale, and appellant Stephans concerning purchase by the

agents of 500,000 Quaaludes and 10 kilograms of cocaine. Appellant Comesana was present at one meeting aboard a boat. The negotiations culminated in a meeting for delvery, at a house on Jack Rabbit Lane, in Miami Lakes, Florida. Vadino, Stephans, and Comesana were present. At Stephans' direction Comesana left and returned with one kilo of cocaine, which Stephans weighed and tested. No more cocaine, and no Quaaludes, were brought to the delivery site before arrests were made.

After arrests were made at the house and while agents were still there, Agent Carew answered a telephone call from Stephans' wife. The agent told her that Stephans wanted her to "bring the stuff over." She

replied that she could not because she had a runner there. Later that day agents went to the Stephans' home and entered it. The validity of this entry is questioned. A few minutes later a search warrant was issued, and pursuant to it the agents searched the house and found cocaine, Quaaludes, narcotics paraphernalia, and handwritten notes bearing the name of appellant Perez-Herrera.

While in the Stephans' house Agent Bumar answered a telephone call from Perez-Herrera, who identified himself as Stephans' "source of supply for drugs." That day and the next Bumar conducted a series of calls to Perez-Herrera. Tapes of these conversations were played at trial. Several of Perez-Herrera's statements, the jury could have found, related to the

deal with the government agents. In the first call Bumar told Perez-Herrera he was waiting for Stephans in order to complete a drug purchase. Perez-Herrera identified himself as Stephans' source of supply for drugs and asked Bumar to have Stephans return his call. In later calls Bumar asked if Perez-Herrera had promised Stephans ten kilos of cocaine, and Perez-Herrera answered in the affirmative. Bumar referred to Stephans "promising us 10 from you", and Perez-Herrera again answered affirmatively. Also Perez-Herrera told Bumar that Stephans had called him that day and asked for 500,000 Quaaludes that he did not have. He told Bumar that he was expecting a million and a half Quaaludes the next day. The jury could have found that

the ten kilos of cocaine and the Quaaludes just referred to were the subject of the deal with agents.

A statement by Perez-Herrera offering to sell Bumar anything he wanted is not referable to the deal with the agents. In a call Perez-Herrera referred to holding 100,000 Quaaludes for Stephans; possibly the jury could not relate this to the deal made with the agents.

At trial Natale and Vadino asserted the defense of entrapment; in opening statements their respective counsel acknowledged that most of the prosecutor's opening statements describing the relevant events was correct.

1. The superseding indictment; grand jury minutes.

The original indictment, returned

February 20, 1979, charged all appellants except Perez-Herrera with conspiracy to possess narcotics. Later, on April 4, Agent Bumar, who had talked by phone with Perez-Herrera, testified before the same grand jury concerning these conversations. The grand jury then returned a superseding indictment that was the same as the first indictment except that it added Perez-Herrera as a defendant to the conspiracy charge.

Natale, Vadino and Stephans contend that they could not validly be tried under the superseding indictment because it was supported by only evidence against Perez-Herrera and no evdience against them. In effect this argument is that, as a basis for the superseding indictment, the

government was required to re-present to the same grand jury the same evidence that the grand jury previously had heard, otherwise there was no evidence that these appellants were participating in the same conspiracy with Perez-Herrera. No authority is cited for this proposition, and we perceive no basis for holding that the grand jury must be told a second time what it already had been told.

In a variation of the same theme, these three appellants urge that they were prejudiced because adding Perez-Herrera as a defendant enabled the government to introduce at trial, over objections, Perez-Herrera's statements to Agent Bumar, which opened up a broader scope of activities in the penumbra of which they

did not participate. But if the superseding indictment was valid - and we hold it was - to the extent Perez-Herrera's testimony was relevant to the conspiracy that it charged, the testimony was admissible. It was "prejudicial" in only the sense that it was probative of guilt.

Natale and Vadino argue that as a matter of law the evidence showed there were several conspiracies rather than a single conspiracy. This contention is frivolous. Alternatively they say that the jury could have found several conspiracies rather than one but was not instructed on this issue. Pretermitting whether such an instruction would have been appropriate, Natale and Vadino did not request it.

II. Admissibility of co-conspirator's statements.

(A) Statements of Perez-Herrera

Natale, Vadino and Stephans contend that as to them Perez-Herrera's telephone statements to Bumar were inadmissible hearsay that do not qualify for the co-conspirator's exception of F.R.Ev. 801(d)(2)(E) because there was insufficient evidence to link Perez-Herrera to the conspiracy and also that when his statements were made the conspiracy had termianted by the arrest of all the conspirators known to the agents. The government concedes that it did not meet the requirements of U.S. v. James, 590 F.2d 575 (5th Cir.), cert. denied 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979) with respect to these statements.

This point means little with respect to Natale and Vadino. Their assertion of the defense of entrapment constituted an admission that they committed acts constituting the offenses charged. See U.S. v. Brooks, 611 F.2d 614 (5th Cir. 1980); U.S. v. Greenfield, 554 F.2d 179 (5th Cir. 1977); U.S. v. Morrow, 537 F.2d 120, 138-139 (5th Cir. 1976).[1/] The testimony of

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1/ One count on which Natale and Vadino were convicted charges conspiracy under some circumstances a defendant charged with conspiracy may plead entrapment and thereby admit overt acts but deny intent to engage in conspiracy. U.S. v. Greenfield, supra. This exception to the general rule has no application here where respective counsel for Natale and Vadino told the jury in opening statements that the prosecutor's description of the conspiracy was substantially correct.

Perez-Herrera did not relate at all to the entrapment defense.

With respect to Stephans, admission of Perez-Herrera's statements was not reversible error. Stephans' participation in the conspiracy was established by overwhelming evidence independent of the Perez-Herrera statements. Stephans had been at one of the initial meetings aboard a yacht, where he delivered to agents samples of cocaine and Quaaludes. He described the Quaaludes as coming from Colombia and stated that they had an "excellent supply." At a later meeting on the boat Stephans quoted the price of cocaine and Quaaludes, stated the location for delivery, gave instructions for getting there, said that delivery would

be in increments, and stressed the need for caution. When the group met at the Jack Rabbit Lane house for the delivery, Comesana left at Stephans' direction and returned later with a box containing a kilo of cocaine, which Stephans weighed and tested. Later that day Stephans' home was searched, and drugs and drug paraphernalia found there. Stephans offered no evidence in his defense. If admitting Perez-Herrera's telephone conversation was error, it was not reversible. Stephans was nailed without this evidence.

(B) Statements by Natale, Vadino and Stephans

On James grounds Comesana questions the admission against him of out-of-court statements by Natale, Vadino and Stephans relating to his

role in the activities. Pretermitting whether there was sufficient independent evidence to connect Comesana to the conspiracy when the tesitmony was admitted, there was adequate independent evidence before the end of the trial. When agents met on the boat for the first time with Vadino and Stephans, Comesana was also present. When an agent objected to Comesana's presence Vadino and Stephans explained that he was a karate expert and an expert marksman and was "Stephans' man" and was present for protection. These statements were in furtherance of the conspiracy - they were made to win acceptance by the agents of Comesana's presence and to explain his role in the conspiracy and his qualifications for it. There was other evidence that Comesana was

present at the Jack Rabbit Lane house where the delivery was to take place. At Stephans' direction Comesana left the house and returned shortly thereafter with a kilo of cocaine, which Stephans weighed and tested.

Under James it is enough that proper foundation was laid by the end of the trial.

Admission of the statements of Natale, Vadino and Stephans did not violate the confrontation clause of the Constitution. The statements possessed "indicia of reliability" - they were spontaneous and supported by other evidence.

III. Entry into and search of Stephans' home.

When agents went to the Stephans' home, Mrs. Stephans answered their knock. The district court did not

err in finding that she voluntarily consented to their entering.

At approximately the same time other agents were obtaining a search warrant for the Stephans' house. After it was issued agents who had been waiting at the house searched the house and seized narcotics and drug paraphernalia on the authority of the warrant. The affidavit supporting the search warrant sufficiently established probable cause.

IV. Telephone calls to and from the two houses.

Stephans contends that agents violated Title III of the Omnibus Crime and Safe Streets Act, 18 U.S.C. 2510 et seq., and the Fourth Amendment, by receiving and making telephone calls on telephones at the Jack

Rabbit Lane house and at his home on Milk Wagon Lane.

With respect to the Jack Rabbit Lane house, Stephans contends that items later seized at his home pursuant to the search warrant should have been suppressed because they were the fruits of Agent Carew's answering the phone at the Jack Rabbit Lane house and receiving the call from Stephans' wife. Assuming arguendo that this issue was properly raised[2/] we perceive no privacy interest of Stephans that was violated under Fourth Amendment standards. Stephans was not a party to

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2/ Stephans did not before or at trial move to suppress Carew's conversation with Mrs. Stephans, as required by F.R.Crim.P. 12(b)(3) & (f).

the conversation with Carew. When Carew answered the ringing phone the caller identified herself as Stephans' wife and freely talked to Carew. The record does not reveal that Stephans had such ownership or control of the Jack Rabbit Lane houseas might arguably give him standing to object to Carew's answering the telephone.

Even if the Jack Rabbit Lane house was under Stephans' dominion and control - which was not satisfactorily established - Title III does not bar Bumar, an officer lawfully on the premises, from answering the ringing telephone. U.S. v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979).

With respect to the Milk Wagon Lane house, Stephans conceded at trial that he did not question the

validity of Agent Bumar's receiving the first incoming call from Perez-Herrera. Several calls were later made by Bumar to Perez-Herrera and were recorded. It appears that two of them originated from the Miami DEA office. The origin of the remaining four is not entirely clear, but assuming they originated at (and were recorded from) the Milk Wagon Lane house, we have already held in part II(A) that admission of Perez-Herrera's statements was not reversible error with respect to Stehans because his guilt was established by overwhelming independent evidence.

V. Severance.

Stephans, Comesana, and Perez-Herrera contend they were entitled to severance because the entrapment defense offered by Natale and Vadino

was antagonistic and mutually exclusive to their defense. A co-defendant's reliance on entrapment does not of itself justify reversing a refusal to sever but rather the defenses must be antagonistic to the point of being mutually exclusive. U.S. v. Salomon, 609 F.2d 1172, 1173 (5th Cir. 1980).

The assertion by Natale and Vadino of their entrapment defense was not of itself mutually exclusive or irreconcilable with defenses by other defendants. The other defendants do not contend that Natale or Vadino offered evidence tending to incriminate them. Assertion of an entrapment defense may tend to bolster the credibility of proseciton witnesses, a point made by Perez-Herrera, but this is not enough to

require severance, especially when the government's evidence is essentially uncontradicted. See, e.g., U.S. v. Eastwood, 489 F.2d 818, 821-22 (5th Cir. 1973); U.S. v. Russo, 455 F.2d 1225 (5th Cir.) cert. denied, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86 (1972).

Nor were the other defendants entitled to severance because in opening statements counsel for Natale and Vadino admitted that most of the matters said by the prosecution in its opening statement were correct. Counsel for Natale and Vadino qualified their statements as being applicable to only their respective clients. The court instructed the jury that they should consider the case of each defendant separately.

The denial of severance did not violate the Sixth Amendment rights of other defendants under Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and DeLuna v. U.S., 308 F.2d 140 (5th Cir. 1962). The concessions stated by counsel for Natale and Vadino were not the equivalent of co-defendants' statements subject to Bruton, and indeed, the court instructed that they were not evidence at all. DeLuna concerns severance where a defendant has a need to comment on the silence of a co-defendant, but the defenses of the two must be truly antagonistic rather than merely inconsistent.

Perez-Herrera was not, for reasons peculiar to him, misjoined under Criminal Rule 8(b) and 14, and the court did not err in denying him a sever-

ance. The evidence with respect to him, discussed below in Part IV, permitted the jury to infer that he was the supplier of the cocaine and the Quaaludes to be delivered to the agents in the sale and delivery in which the other conspirators were directly participating.

IV. Sufficiency of the evidence.

The court did not err in denying Perez-Herrera's motions for judgment of acquittal. The stong evidence against him was the taped conversations between him and Agent Bumar. We have described in the first part of this opinion the content of the calls and the parts that the jury could have found were the subject of the deal with the agents. This evidence was sufficient to submit the case to the jury. Moreover, the hand-

written notes found in the trash compactor at the Stephans' home tied Perez-Herrera to Stephans. One said "Ellio (at home). Good news [with a line drawn through these two words]" Elio is Perez-Herrera's first name. The other said "Ellio in!! [underlined five times]." One note indicated that Perez-Herrera had called twice.

VII. Evidence of extrinsic offenses by Perez-Herrera

Perez-Herrera objected to admission of the portions of his telephone conversations with Bumar relating to future drug transactions. This evidence was admissible under F.R.Evid. 404(b) and 403. Perez-Herrera's stated willingness to do business with Bumar in the future bolstered Perez-Herrera's statement that he was

indeed a "source of supply", which he had identified himself as being.

Assuming that Perez-Herrera's objections were sufficient to reach the parts of the tapes that related to transactions, present and past and other than the deal with the agents, admitting these portions was not reversible error. Possibly the jury could not find that the reference to holding 100,000 Quaaludes for Stephans was related to Stephans' order for 500,000 Quaaludes, but in the context of the order for 500,000, and of Perez-Herrera's statement that he was expecting a million and a half Quaaludes the next day, the reference to a separate deal with Stephans for 100,000 Quaaludes is of minimal significance.

VIII. Voir dire of jury.

All appellants except Comesana urge as error the refusal of the court to permit questioning of prospective jurors concerning the weight to be given a law enforcement officer's testimony, merely because he is a law enforcement officer, as opposed to the testimony of an ordinary citizen. Such questioning would have been of little consequence except to Stephans. Natale and Vadino were asserting that they were entrapped by the non-officer informer Allen, who set them up with government agents. The case against Perez-Herrera depended largely on the tapes of his telephone conversations with Bumar. In any event, we are bound by the rule

of the former Fifth Circuit[3] in U.S. v. Jackson, 448 F.2d 539, 542-43 (5th Cir.) cert. denied 404 U.S. 1063, 92 S.Ct. 750, 30 L.Ed.2d 752 (1972), and U.S. v. Gassaway, 456 F.2d 624, 626 (5th Cir. 1972), that such a refusal is not an abuse of discretion. Other circuits agree.[4]

IX. Instructions to jury on entrapment.

The jury instruction on entrapment is set out in the margin.[5]

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[3] Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)(en banc)(all Fifth Circuit cases decided before close of business September 30, 1981 binding on Eleventh Circuit).

[4] Gorin v. U.S., 313 F.2d 641 (1st Cir. 1963); U.S. v. Gore, 435 F.2d 1110 (4th Cir. 1970); Ross v. U.S., 374 F.2d 97 (8th Cir. 1967).

[5] Certain defendants assert (fn.cont.)

Natale and Vadino objected and asked the court to instruct that the burden of proving that they were not entrapped was on the government. The paragraph beginning "if, then, the jury should find ..." says, paraphrasing, that if the jury finds

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(fn.cont.)
that they were victims of entrapment as to the offense charged in the indictment.
Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents, or informants, to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.
On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is not entrapment.
For example, it is not entrapment for a Government agent to pretend to be someone else, and to offer, either directly or through an informer, or other decoy, to engage in an unlawful transaction.
(fn.cont.)

beyond reasonable doubt that defendants were predisposed and that governmental participation was no more than the offer of an opportunity, then defendants were not entrapped. The next paragraph says,

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(fn.cont.)
If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.
On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of htre character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

paraphrasing, that if the evidence leaves the jury with reasonable doubt whether defendants were predisposed, then they are to be found not guilty.

Defendants rely upon U.S. v. Wolffs, 594 F.2d 77 (5th Cir. 1979), in which the court reversed for a faulty charge on entrapment. In the Wolffs entrapment instruction, however, the court mentioned neither the reasonable doubt quantum of proof nor the party who bore that burden. In this case the court twice referred to the reasonable quantum of proof of predisposition but did not, within the entrapment instruction, refer to the party having the burden. The court, however, gave a general instruction on burden of proof, told the jury to consider the charge as a whole, and instructed that "the law

does not require a defendant to prove his innocence or produce any evidence at all."

While it would have been better to include within the entrapment instruction itself an instruction on burden of proof, the jury instruction considered as a whole was sufficient.

X. Miscellaneous issues

Other issues may be disposed of summarily, some without comment.

In testimony DEA agents referred at times to appellants as "traffickers," "violators" and "conspirators" and the group as the "Natale organization." To the extent these descriptions were subject to objection at all, they were clearly not reversible.

Even if the matter was properly raised, it was not error for the

court to grant the jury's request to rehear taped conversations between agents and defendants but to deny the jury's request for written transcript of testimony of agents.

Comesana's argument that opening statements of counsel for Natale and Vadino, see part V, supra, were comments upon his Fifth Amendment right to remain silent is totally meritless.

The convictions are AFFIRMED.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Frank J. VADINO, Elio Perez-Herrera, Ivan L. Stephans, Eduardo Comesana, and Ralph Natale,
Defendants-Appellants.

No. 80-5716.

United States Court of Appeals,
Eleventh Circuit.

Nov. 15, 1982.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion July 19, 1982, 11 Cir., 1982, 680 F.2d 1329)

Before GODBOLD, Chief Judge, RONEY and WOOD*, Circuit Judges.

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* Honorable Harlington Wood, Jr., U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

We said with respect to Stephans that his participation in the conspiracy was established by overwhelming evidence independent of the Perez-Herrera statements. We recited that independent evidence. To erase any doubt of what we meant by our holding, admissibility of the Perez-Herrera statements against Stephans was harmless error beyond reasonable doubt under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The petitions for rehearing of Stephans, Comesana, Natale and Vadino are DENIED, 680 F.2d 1329, and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestions for Rehearing En Banc of Stephans, Comesana, Natale and Vadino are DENIED.

... two of the conversations --

MR. TUNKEY: I heard three conversations, and all on the same cassette. I will show you the cassette.

MR. HANNA: They are not -- They were not on the same Government's cassette. They were on two different Government cassettes. That is the point I tried to make. He must have had two of the Government cassettes.

MR. TUNKEY: I have three conversations from one cassette. It doesn't matter.

THE COURT: Well, I think it is a very difficult question, but I am going to adopt the position as a factual matter, there is no violation

of the standing discovery order on the part of the Government, and those tapes would not be kept out on that account.

Now, as far as these matters raised by Mr. Kogen about the date, I am going to rule that that is sufficiently covered in the indictment to include a date just one day subsequent to those dates specifically mentioned in the indictment. I think the law is clear on that.

Also, I have reviewed the statutes relative to wiretaps, and it is my view those statutes are not applicable - that section of the code is not applicable. Here we have not really a tap of a phone, but we have a consenting agent carrying on a conversation with Mr. Perez-Herrera which conversations assertedly

include admissions against interest, and they should be admissible againsthim on that score.

MR. KOGEN: How is it going to be applied to my client?

THE COURT: Now, insofar as the other Defendants are concerned, if there are -- If these are co-conspirator statements, it is my ruling that the conspiracy had not necessarily ended at the time of their arrest. The law is clear that an arrest does not necessarily end the conspiracy, and I think it is simply going to be a question as to whether or not those statements do implicate other particular individuals. If they do, I think, although we haven't really reached the point where I could make a ruling on the James hearing here, but if we get past that

James thing, those co-conspirator statements are to come in.

MR. NAHOOM: Excuse me, your Honor. I wasn't aware we ever had a James hearing.

THE COURT: We have not had a James hearing. The order of proof of the Government at some point will require me to make a finding on a preponderance of evidence whether or not the requirements of that case have been met, and I don't think we are quite there yet - at least as to all of the Defendants we are not. We perhaps are as to some of them.

MR. TUNKEY: Last, how about the 404 about evidence?

THE COURT: 404 about evidence, as has ...

SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

The Premises known as a
6358 Milk Wagon Lane

Magistrate's Docket No.
79-4805-PJK

SEARCH WARRANT

To Special Agent of the Drug Enforcement Administration, and any other authorized law enforcement officer.

Affidavit having been made before me by W. Barry Carew, Special Agent, Drug Enforcement Administration, that he has reason to believe that on the premises known as 6358 Milk Wagon Lane, Miami Lakes, Florida in the Southern District of Florida there is now being concealed certain property, namely cocaine, methaqualone; United States currency; plastic baggies;

scales; plastic containers; telephone-address books; customer-supplier lists; code books; narcotics; narcotic paraphernalia; firearms; mixing, cutting, and measuring spoons; contraband, financial records of narcotics transactions; bank books; safe deposit keys; any property that constitutes evidence of the below-described offenses being kept there in violation of Title 21, U.S. Code, Sections 841(a)(a); 843; and 846 involving possession with intent to distribute cocaine and methaqualone and distribution of cocaine and methaqualone, a Schedule II narcotic drug controlled substance as defined in the Controlled Substances Act 1970, and as I am satisfied that there is probable cause to believe that the property so described is being concealed

on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 8 day of Feb., 1979.

/s/ Patricia J. Kyle
Patricia J. Kyle
U.S. Magistrate

The Federal Rules of Criminal Proce-

dure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that suspect is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 11C).

This is certified to be a true and correct copy of the original

/s/_____

Deputy Clerk, U.S. Magistrate